

HUMAN RIGHTS FEATURES

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Sovereignty of the People or the State: UN Resolutions on Libya spark renewed Debate

The international response to the recent crisis in Libya, which arose as part of the pro-democracy protests sweeping the Middle East and North Africa, is being hailed as a major victory for the recognition and implementation of the concept of responsibility to protect (R2P).¹ In February and March 2011, the Security Council of the United Nations passed two resolutions demanding that Libya fulfill its responsibility to protect its civilians instead of attacking them during the course of peaceful protests and later an armed rebellion, as leader Colonel Muammar el-Qaddafi has done so far.² Resolutions 1970 and 1973 allow the international community to impose economic and diplomatic sanctions on the Qaddafi government and authorize it to take military action short of an invasion and occupation to execute its concurrent responsibility to protect Libya's civilians.

The resolutions are important for another reason. The Security Council acted, at least initially, on pleas to prevent crimes against humanity by Libya's diplomatic mission to the UN, which had broken ties with the Qaddafi government and claimed to be the representative of the true sovereign, the people.³ As the representative of the people, the diplomatic mission sought a no-fly zone over Libya to stop Qaddafi from bombing protesters and civilians and "to prevent mercenaries, weapons and any other supplies from reaching Qaddafi's forces."⁴ Treating the diplomatic mission's request as an explicit request of the Libyan people, the Security Council called an emergency session that ultimately resulted in the Resolution 1970.⁵ With the support of the Arab League for a no-fly zone,⁶ the Security Council adopted both resolutions believing it was acting on behalf of the legitimate sovereign of Libya.

¹ Irwin Cotler and Jared Genser, Op. Ed., Libya and the Responsibility to Protect, International Herald Tribune February 28, 2011; Ramesh Thakur, UN Breathes Life into 'Responsibility to Protect,' The New York Times, March 21, 2011.

² United Nations Security Council Resolution 1970 S/RES/1970 (2011) and United Nations Security Council Resolution 1973 S/RES/1973 (2011).

³ UPDATE 5-Libyan U.N. Mission Urges Gaddafi's Downfall, Reuters, 21 February 2011.

⁴ Edith M. Lederer, Libya's UN Diplomats are Calling for Leader Col. Moammar Gadhafi to Step Down, Associated Press, 21 February 2011.

⁵ Susan E. Rice, Fact Sheet: New UN Security Council Resolution on Libya, US Mission to the UN, March 18, 2011.

⁶ Angela Charlton, World Intervenes in Libya, with Unusual Speed, Associated Press March 20, 2011.

The reason the Security Council's considerations of the diplomatic mission's request is so unique is it challenges the traditional application of the concept of sovereignty. Sovereignty in the international context belongs to states, not people.⁷ International law protects four rights belonging to the sovereign: the rights to (1) protection from foreign intervention in domestic affairs;⁸ (2) protection against attacks on territorial and political integrity;⁹ (3) recognition of sovereign equality of states,¹⁰ and (4) choice of whether to be bound by international legal obligations.¹¹ These rights were developed to organize international relations and mediate often tense international political situations.¹² Whether a country qualifies for these rights depends on whether it meets the four internationally recognized criteria for statehood.¹³ The test questions whether the government can control the population and territory, not whether it represents the people. A country loses its sovereign rights only in the rarest of circumstances, such as when it threatens international peace and security¹⁴ or when it commits crimes sufficient to activate R2P.¹⁵ Ultimately, the state-centric focus of sovereignty treats the state as the sovereign and the government as the state's representative, leaving no role for the people in the international law analysis of sovereignty.¹⁶ In doing so, it often permits governments to use the sovereign right to be free from intervention in domestic affairs to hide domestic human rights abuses.

The Security Council's respect for the Libyan diplomatic mission's role as the representative of the people takes the first step in giving sovereignty back to the people, where it belongs at least on paper. International human rights instruments and most constitutions explicitly state that sovereignty belongs to the people.¹⁷ Flowing from the concept developed by John

⁷ See e.g. Don Melvin, France Formally Recognizes Libyan Opposition Group, Associated Press March 10, 2011 (Describing European response to France's diplomatic recognition of an Interim Governing Council as the legitimate representative of the people as: "EU policy is normally to recognize states, not governments.")

As will be discussed shortly, while there are human rights conventions that guarantee sovereignty in the people, international law grants sovereign rights to the government, not the people.

⁸ Frédéric Gilles Sourgens 'Positivism, Humanism, And Hegemony: Sovereignty And Security For Our Time' 25 Penn St. Int'l L. Rev. 433, 448 (2006)

⁹ Kurt Mills, Human Rights in the Emerging Global Order A New Sovereignty (1998) 131.

¹⁰ John H. Jackson 'Sovereignty-Modern: A New Approach To An Outdated Concept' 97 Am. J. Int'l L. 782, 782 (2003).

¹¹ David Held 'The Changing Structure of International Law: Sovereignty Transformed?' 162 in David Held, Ed. The Global Transformations Reader. 2Ed (2003); Ivan Simonovic 'State Sovereignty And Globalization: Are Some States More Equal?' 28 Ga. J. Int'l & Comp. L. 381, 384 (2000); Gilles, supra note 8 at 448.

¹² See .e.g. Michael J. Kelly 'Pulling At the Threads of Westphalia: "Involuntary Sovereignty Waiver" - Revolutionary International Legal Theory or Return to Rule by The Great Powers?' 10 UCLA J. Int'l L. & Foreign Aff. 361, 374 (2005)

¹³ Jackson, supra note 10 at 786; John Alan Cohan 'Sovereignty In A Postsovereign World' 18 Fla. J. Int'l L. 907, 920 (2006).

¹⁴ United Nations Charter Article 2(7).

¹⁵ 'Resolution Adopted by General Assembly World Summit Outcome 60/1. 2005 para. 138 and 139.

¹⁶ Helen Stacy 'Relational Sovereignty' 99 Am. Soc'y Int'l L. Proc. 396, 399 (2005).

¹⁷ See e.g. Universal Declaration of Human Rights Article 21(3); International Covenant on Civil and Political Rights Art. 1, International Covenant on Economic, Social and Cultural Rights, Art. 1; Constitution of Afghanistan (2004) Article 4; Constitution of India (1950) Preamble; Constitution of Algeria as amended in 1996 (1989) Article 6; Constitution of Bangladesh (2004) Article 7; Constitution of Belarus as amended in 1996 (1994) Article 3; Constitution of Brazil (1983) Article 1; Constitution of the People's Republic of China as amended through March 2004 (1982) Preamble, Articles 1 and 2; Constitution of France (1958) Article 3; Constitution of Mexico (1917) Article 39; Constitution of Venezuela (1999) Article 5; The Constitution of the Russian Federation (1993) Article 3; The 1945 Constitution of the Republic of Indonesia (1945) Article 1; The Constitution of the Republic of Mali (1991) Preamble and Article 25; Constitution of Libya (1969) Article 1.

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Locke and Jean Jacque Rousseau,¹⁸ sovereignty in the people treats the government as the representative of the people, rather than the actual sovereign.¹⁹ It is entitled to sovereignty rights only as long as it retains its popular legitimacy, represents the people and acts in their common good.²⁰ Having the strength to override the will of the people transforms the government into the master, not the sovereign.²¹

The wording of the Libyan diplomatic mission's letter forced the Security Council to analyze who is the sovereign of Libya rather than who has the power to control the country. The Security Council sided with the people rather than a dictator with substantial control over the country, infusing meaning into the concept of sovereignty in the people. The recognition of the diplomatic mission as the representative of the people allowed the international community to ignore Qaddafi's efforts to shield human rights violations behind sovereignty rights. It also highlights the importance of continually reassessing whether an existing government is truly representative of the people, rather than effectively assuming it.

Another important aspect of the concept of sovereignty in the people is that all of the people must be represented by the government in order for it to benefit fully from sovereignty rights. Minority groups form part of "the people" and when the will of the majority overrides the will of the minority systematically and repeatedly, resulting in persistent human rights violations, the government has no right to claim sovereign rights with respect to the minority community.²² That means the government is not protected from international scrutiny of its abuses against the minority community.

This revitalized concept of sovereignty in the people could have been lifesaving in Sri Lanka where it is estimated that the government in the main but also Liberation Tigers of the Tamil Eelam contributed to the slaughter of tens of thousands of civilians belonging to the minority Tamil community during the end of the civil war in 2009.²³ The international community mostly ignored the plight of Tamil civilians,²⁴ seemingly convinced by the Sri Lankan government's repeated argument that as a sovereign country being attacked internally, it is entitled to protection from intervention in its domestic affairs.²⁵ This sovereignty claim succeeded for several reasons that stand in direct contrast those justifying the international

¹⁸ Jean d'Aspremont 'Legitimacy of Governments in the Age of Democracy' 38 N.Y.U. J. Int'l L. & Pol. 877, 884 (2006); Cindy G. Buys 'Burying Our Constitution In The Sand? Evaluating The Ostrich Response To The Use Of International And Foreign Law In U.S. Constitutional Interpretation' 1 BYU J. Pub. L. 1, 18 (2007);

¹⁹ This is a shift from Westphalian sovereignty that deemed that the rights of sovereignty belonged to the government alone and are absolute. Kelly, *supra* note 12 at 370.

²⁰ Hallie Ludsin, "The Meaning of 'Sovereignty in the People', Draft 8, The Centre for Policy Alternatives 22 (July 2009) (on file with SAHRDC).

²¹ Jean Jacques Rousseau *The Social Contract* Book 2, Chapter 1 at http://www.constitution.org/jjr/socon_01.htm.

²² Ludsin, *supra* note 20 at Part III.

²³ 'War Crimes in Sri Lanka' International Crisis Group Asia Report No. 191 p. 1 and 24 (2010). Estimates of civilian deaths range from zero, as claimed by the Sri Lankan government, to 20,000, as reported by the Times of London and the BBC. See Robert Mackey, Sri Lanka Disputes Report of 20,000 Dead, Lede, Blog, The New York Times, May 29, 2009; Peter Bouckaert, Sri Lanka Still Denying Civilian Deaths, The Guardian, 5 September 2010.. An official UN tally several weeks before the end of the war placed the civilian death toll at 6500, leading to our support for a final tally in the tens of thousands. Ravi Nessman, [UN says nearly 6,500 civilians dead in Sri Lanka](#), Associated Press - April 24, 2009.

²⁴ *Id.*

²⁵ Instead, much of the international community celebrated the demise of a terrorist group without consideration of the impact on the civilian Tamil population. 'Sri Lanka: UN Rights Council Fails Victims' Human Rights Watch May 27, 2009.

community's swift action in Libya. The international community expressed only apathy to increasing evidence of war crimes in geopolitically less important Sri Lanka,²⁶ whereas it seems invigorated by the potential demise of oil-rich Libya's dictator. The Sri Lankan government is considered the legitimate representative of the majority Sinhalese population at war with the LTTE, whereas Qaddafi is nearly universally despised not only for his internal human rights abuses but as a mastermind of international terrorist attacks. The Libyan diplomatic mission seems to be a legitimate representative of the majority, while the civilians being killed in Sri Lanka are a minority group principally represented by the LTTE, which is considered a terrorist organization internationally.

Basically, without an internationally acceptable representative, the Tamil population could not claim its sovereignty rights as a part of "the people."²⁷ The international community was unwilling to reassess whether the existing government or the LTTE were truly its representatives, permitting the Sri Lankan government to hide its war crimes behind a sovereignty shield at the cost thousands of lives.²⁸ The shield also deflected the legitimate R2P claim of the Tamil population that also could have been life saving.

Providing substance to the guarantee of sovereignty in the people plays an even more important role when some or all of "the people" are suffering severe human rights violations that do not meet the criteria for the application of responsibility to protect. International intervention under the revitalized concept is not limited to circumstances of war crimes, crimes against humanity or genocide, as with R2P. Dictatorships, for example, cannot use sovereignty rights to shield themselves from international intervention when they consistently commit less extreme violations of human rights.

Unfortunately, the international community is only selectively applying sovereignty in the people to other Middle Eastern countries facing similar pro-democracy protests as Libya. Bahrain has a Sunni Islamic monarchy that is known for discriminating against the majority Shiite population.²⁹ The monarchy has sought to repress the peaceful protests of the mainly Shiite protestors, but so far has restrained itself sufficiently that R2P does not apply.³⁰ Much of the international community is choosing to avoid similar recognition of sovereignty in the people that it applied to Libya. Instead, it is propping up what is effectively an Apartheid government for strategic reasons, highlighting the fundamental weakness of an international system guided more by geopolitics than morality or legality. The United States, for example, considers Bahrain an important ally, as it allows the US to maintain a naval base in the Gulf and also supplies the US with oil.³¹ Much of the world fears that the Sunni monarchy will be replaced by a Shiite government aligned with Iran.³² Saudi Arabia, which is vehemently

²⁶ See e.g. Steve Crawshaw, 'An Urgent Need for UN Action on Sri Lanka', The Huffington Post, May 6, 2009 ("The international reaction to this spiraling disaster can be summed up as: don't bother us now, we're a bit busy."). Steve Crawshaw, 'Letter to UN Security Council Regarding the Debate on Protection of Civilians in Armed Conflict', Human Rights Watch, June 22, 2009.

²⁷ In fact, the United Nations Human Rights Council passed a resolution celebrating the Sri Lankan government victory over the LTTE despite mounting evidence of serious war crimes committed in the process. 'Sri Lanka: UN Rights Council Fails Victims,' Human Rights Watch, May 27, 2009.

²⁸ See e.g. 'Letter to UN Security Council Regarding the Debate on Protection of Civilians in Armed Conflict', Human Rights Watch, June 22, 2009.

²⁹ 'Bahrain Unrest: Thousands Join Anti-Government Protests', BBC 22 February 2011.

³⁰ Id.

³¹ Helen Cooper and Mark Landle, Interests of Saudi Arabia and Iran Collide, With the U.S. in the Middle, The New York Times, March 17, 2011.

³² Id.

opposed to the Iranian government and is connected to Bahrain by a causeway, has gone so far as to send military troops to help stifle protests. Bahraini protesters are well aware of the hypocrisy of the international community. Many protesters believe that “their dreams of democracy are being thwarted by the United States’ desire to protect a large naval base in Bahrain, by the perception that Shiites reflexively side with Iran, and by the influence of neighboring Saudi Arabia.”³³

A revitalized concept of sovereignty in the people could go far towards striking down the sovereignty shields behind which governments hide their domestic human rights violations, as is apparent in Libya. Unfortunately, as the circumstances in Bahrain underscore, currently the international community is supporting sovereignty in the people only when it is politically convenient.

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³³ Thomas Fuller, “Bahrainis Fear the U.S. Isn’t Behind Their Fight for Democracy,” The New York Times, March 4, 2011.